

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 201
EMPC 166/2022**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN STUART YOUNG
 Plaintiff

AND PORT OF TAURANGA LIMITED
 Defendant

Hearing: 22 September 2022
 (Heard at Auckland)

Appearances: E Lambert, advocate for plaintiff
 S Grice, counsel for defendant

Judgment: 9 November 2022

JUDGMENT OF JUDGE J C HOLDEN

[1] The plaintiff has challenged a preliminary determination of the Employment Relations Authority (the Authority) in which the Authority declined his application for interim reinstatement.¹ This judgment resolves that challenge.

[2] The determination sets out the background facts in some detail.² The key facts follow.

[3] The defendant operates a port that receives cargo ships from around the world. The plaintiff was employed there as a tug engineer.

¹ *HLI v VMZ* [2022] NZERA 164 (Member Fuiava).

² At [19]–[56].

[4] On 30 April 2021, the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) came into effect. The Order required certain people who worked at the defendant's port to be vaccinated against COVID-19.

[5] Effective from 14 July 2021, the Order was amended so that it applied to workers who handled affected items within 72 hours of the removal of those items from affected ships and who had contact with members of groups specified in sch 2 pt 4 of the Order while both were working.³

[6] The groups covered in sch 2 pt 4 relevantly included pilots carrying out work on or around affected ships.⁴

[7] The Order also provided for medical exemptions for affected persons if:⁵

- (a) the affected person has particular physical or other needs a suitably qualified health practitioner (in the course of examining the person) determines would make it inappropriate for the person to be vaccinated; and
- (b) the relevant PCBU has provided the register with written confirmation that a suitably qualified health practitioner—
 - (i) has examined the affected person; and
 - (ii) has determined that vaccinating the affected person would be inappropriate.

[8] Under the Order, and absent an exemption, an affected worker, who was not a service worker, had to have their first vaccination before the close of 30 September 2021. The defendant met with the plaintiff in September 2021 to discuss the Order and its application to him. In the course of the discussion, it became apparent that the plaintiff was not vaccinated and had no intention of getting vaccinated against COVID-19.

[9] Initially, there was some uncertainty over whether the Order applied to the plaintiff, but after receiving advice from the Ministry of Health, the defendant determined that it did, principally because he handled mooring lines and tow lines from affected ships and came into contact with pilot launch masters. On 23 September

³ COVID-19 Public Health Response (Vaccinations) Order 2021, sch 2 cl 6.4.

⁴ Schedule 2 cl 4.2.

⁵ COVID-19 Public Health Response (Vaccinations) Amendment Order 2021, cl 7.

2021, it advised the plaintiff of that view by telephone. On 27 September 2021, the defendant wrote to the plaintiff confirming that it had determined he was covered by the Order and advising him that his employment would terminate on 12 November 2021, the date being extended to allow more time for the defendant to consult the plaintiff regarding a possible redeployment opportunity to a gatehouse security role. That role was paid at a rate approximately half the plaintiff's salary as a tug engineer.

[10] On 30 September 2021, there was a further meeting between the plaintiff and the defendant. The plaintiff confirmed that he would not be vaccinated against COVID-19. He declined the gatehouse security role because of the reduction in pay, saying his current remuneration should be maintained ("grandparented"), which the defendant would not agree to. The plaintiff also said that the defendant had failed to undertake a risk assessment for the available vaccinations and suggested measures, including testing, that would allow him to stay on in employment with the defendant. He suggested rearranging his work so that he did not come in contact with the pilot launch master. The defendant did not consider it feasible to rearrange the plaintiff's work as suggested.

[11] In addition, the plaintiff provided the defendant with two medical certificates – one from Dr Tracy Chandler and one from Dr Sophie Febery. Those medical certificates were not accepted by the defendant for two main reasons. First, the doctors were not the plaintiff's usual doctors and had not seen him. Second, the defendant understood the two doctors involved were providing unreliable exemptions based on anti-vaccination Border Order views. The defendant offered to reimburse the plaintiff the cost of having his usual general practitioner examine him to see whether a medical exemption to vaccination was merited. No further certificate was provided, and the plaintiff's employment ended on 12 November 2021.

[12] After the plaintiff's employment ended, the defendant received communications from him and from others opposed to vaccination which appeared to reference his situation. The plaintiff's communications included:

- (a) A letter dated 12 November 2021 that purported to be a notice seeking information under the Privacy Act 2020 and the Bill of Rights Act 1990 which concluded:

... if you fail to answer the relevant questions any further imposition would therefore be a breach of the common laws of England expressed in the Imperial Laws Application Act 1988 Section 5 common laws of England to apply in which coercion and conspiracy apply. Maximum sentence of seven years imprisonment.

Please supply the relevant information and necessary judgements accordingly within 7 days. Failure to supply in the required time is admittance that there are no such mandates as Court Orders, or any other lawful material is available to justify the coercion taking place.

- (b) A letter dated 22 November 2021, again referring to alleged breaches of "the common laws of England expressed in the Imperial Laws Application Act 1988 Section 5 common laws of England". This letter referred to the directors and employees of the defendant as being a party in "the deception of mandate to procure the administration of a substance officially recorded to cause death and serious injury". It also included that the manager who had taken the lead in dealing with vaccination mandate compliance issues generally, and with the plaintiff in particular:

... would be in breach of the Declaratory Judgments Act 1908 Section 12 and takes full and absolute responsibility for any adverse health event or death caused by such a Vaccination of a port employee under coercion and duress in cause to administer poison.

The letter purported to require the defendant and its employees to:

1. Cease and desist all coercion to comply to the procurement and administration of the COVID-19 vaccination.

2. Inform all employees who have refused the COVID-19 vaccination they are free to resume employment under their original contract without the need to be vaccinated forthwith.
3. Cease and desist all forms of advertising, communication and information promoting the COVID-19 vaccinations.

The letter concluded that if they did not desist forthwith, criminal complaints of coercion to cause administration of poisons would be laid with the relevant authorities, and “if you wish to continue without legal authority you will be accountable for your actions”.

- (c) A document sent on 24 January 2022, entitled “Declaration”. In that document the plaintiff sought \$100 million, \$10 million of which were to be deposited in the plaintiff’s bank account with the remaining \$90 million to be provided in gold bullion or equivalent functional currency as settlement, unconditionally and irrevocably. He also sought a further \$200,000 in gold bullion or equivalent for every day and \$1 million in gold bullion or equivalent for every calendar month or part after 27 September 2021. That document was signed off by the plaintiff and witnessed by two witnesses. In each case, the signatories placed a red fingerprint over their names.

This document made allegations and claims including:

- (i) that murder had taken place;
- (ii) that the defendant and its Board and employees had conspired and coerced the plaintiff into being a party to procurement of administration of a substance officially recorded to cause death and serious injury;
- (iii) that the defendant, its Board and employees had conspired and coerced the plaintiff to be subjected to medical and scientific experimentation against his will, to forfeit the right to refuse medical treatment, to forfeit the right to freedom of thought,

conscience, religious belief, expression and manifestation of religion and belief, or lose his livelihood;

- (iv) that the defendant, its Board and employees had caused premeditated, intentional and deliberate harm and injury to the plaintiff;
- (v) that the defendant, its Board and employees had subjected the plaintiff to (among other things) deprecation of liberty, emotional assault, fraud, blackmail, intimidation threats, duress, coercion, and enticements into slavery; and
- (vi) the assertion that each person named in the notice were jointly and severally liable for the sums claimed.

[13] The defendant provided the plaintiff's communications to the New Zealand Police as it was becoming increasingly worried about what it perceived to be threats from the plaintiff.

The law on applications for interim reinstatement is settled

[14] There was no dispute between the parties as to the applicable law governing the plaintiff's challenge.

[15] Interim reinstatement is provided for in s 127 of the Employment Relations Act 2000 (the Act) pursuant to which the Authority may, if it thinks fit, make an order for the interim reinstatement of an employee pending the hearing of the employee's personal grievance. The Authority must apply the law relating to interim injunctions, having regard to the object of the Act.

[16] In considering an application for interim reinstatement, the Authority (or Court) must:⁶

- (a) determine whether there was a serious question to be tried (or conversely whether the claim is vexatious or frivolous);
- (b) consider the balance of convenience; and
- (c) assess the overall justice.

[17] The question of whether there is a serious question has two components:⁷

- (a) whether there is a serious question to be tried in relation to the claim of unjustifiable dismissal; and
- (b) if so, whether there is a serious question to be tried in relation to the claim for permanent reinstatement.

[18] The threshold in considering whether there is a serious question to be tried is low.⁸

There is a serious issue to be tried on unjustifiable dismissal

[19] The key elements of the plaintiff's substantive claim are:

- (a) he was not a person covered by the order;
- (b) he had valid exemptions from vaccination;
- (c) the defendant failed to properly consider any modification to the tug engineer role that would allow the plaintiff to continue working without vaccination; and

⁶ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90 at [12]; and *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153.

⁷ *Humphrey*, above n 6, at [7].

⁸ At [8].

- (d) the defendant failed to undertake proper risk assessments in relation to the COVID-19 vaccination.

[20] There was some initial confusion as to whether the Order covered the role of a tug engineer. Initially, the advice provided by the Ministry of Health was that it did not, but subsequently, that advice changed to say that it did cover people such as the plaintiff. Such advice is not legally binding. The issue will turn on the wording of the Order itself and the application of it to the circumstances of the plaintiff's employment. On the basis of the evidence currently before the Court, it is arguable that the plaintiff was not covered by the Order. The argument, however, does not appear strong.

[21] Arguably, the medical certificates provided by Drs Chandler and Febery were provided by "a suitably qualified health practitioner (in the course of examining [the plaintiff])". By the time the plaintiff's employment ceased, however, medical exemptions were only able to be granted by the Director-General of Health.⁹ While this weakens the plaintiff's second argument considerably, it is not so weak as to be frivolous and vexatious. It is an argument that meets the threshold of raising a serious issue to be tried.

[22] The plaintiff also has arguments in relation to the suggestion that the defendant ought to have agreed to modifications to his role to enable him to be removed from the coverage of the Order, and that the offer of redeployment ought to have included the grandparenting of his salary. In a situation where an employee's employment is potentially in jeopardy, it is expected that the employer will consider alternatives to the person losing their job. Again, these arguments meet the low bar for a serious issue to be tried.

[23] The remaining argument in relation to obligations to investigate the safety of the COVID-19 vaccination is not seriously arguable. If the Order applied to the plaintiff, and he had no valid exemptions, the defendant could not allow him to perform his role.

⁹ COVID-19 Public Health Response (Vaccinations Certificate Order) 2021, cl 9B (inserted from 11.59pm on 7 November 2021).

Permanent reinstatement not seriously arguable

[24] Permanent reinstatement is the primary remedy under the Act. If an employee succeeds in their claim for unjustifiable dismissal and seeks reinstatement it should be ordered where it is practicable and reasonable.¹⁰

[25] Nevertheless, here there are very significant barriers to permanent reinstatement.

[26] A person has been appointed into the role, and an order for permanent reinstatement would affect that person, as well as placing the defendant in the position of having two employees in the same role. The defendant says there is no applicable vacancy.

[27] The other significant difficulty, which is almost certainly insurmountable, relates to the plaintiff's post-employment conduct towards the defendant and its employees.

[28] The statements made, particularly in the document dated 24 January 2022, are very serious and understandably caused upset to the defendant and its employees.

[29] While I acknowledge that the issue of mandating vaccination against COVID-19 was contentious and that mandates have now been lifted, the plaintiff's conduct towards the defendant and its employees was extreme. The plaintiff minimises but does not resile from his post-termination conduct. On the basis of the evidence currently before the Court, it would not be reasonable to require the defendant to reinstate the plaintiff; the necessary trust and confidence no longer exists.

[30] In the circumstances of this case, and notwithstanding the position of permanent reinstatement under the Act, it is not seriously arguable that the plaintiff would be reinstated on a permanent basis.¹¹

¹⁰ Employment Relations Act 2000, s 125.

¹¹ The defendant also had raised its internal policy requiring vaccination, but that policy has since been rescinded so it is no longer a barrier to reinstatement.

[31] It follows that the plaintiff's challenge to the Authority's determination is unsuccessful. There is no order for interim reinstatement.

[32] I nevertheless consider the balance of convenience and overall justice.

Balance of convenience does not favour the plaintiff

[33] The interests of third parties here are relevant to the balance of convenience. There is somebody employed in the tug engineer role that the plaintiff formerly held, and other employees of the defendant, against whom serious allegations and implied threats have been made by the plaintiff, who would have to work with him. These factors favour the defendant.

[34] While I acknowledge that the plaintiff would have suffered financially from losing his job, and that he prefers an onshore job to one at sea, little evidence has been provided of his personal circumstances. He has had some work since his employment with the defendant ended, so has been able to maintain his skills.

[35] Under this head it is usual to consider the prospective date for a substantive investigation. However, that investigation has been delayed because the plaintiff made a belated application for removal to the Court, which has not yet been dealt with by the Authority. This factor is neutral.

[36] Overall, the balance of convenience favours the defendant.

Overall interests of justice do not favour the plaintiff

[37] The overall interests of justice do not displace the view reached on the preceding matters.

[38] In particular, the plaintiff appears to have a relatively weak case for unjustifiable dismissal, and his post-employment conduct has now almost certainly caused irreparable harm to his relationship with the defendant.

Defendant is entitled to costs from the plaintiff

[39] Having successfully defended this challenge, the defendant is entitled to costs from the plaintiff. The parties agreed that this matter is appropriately allocated category 2B for costs purposes under the Practice Directions Guideline Scale.¹² Those costs ought to be able to be agreed. If that does not prove possible, the defendant may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. The plaintiff is to respond by memorandum filed and served within 14 days thereafter with any reply from the defendant filed and served within a further 7 days. Costs then will be determined on the papers.

Interim non-publication orders continue

[40] At the commencement of the hearing of this challenge, the Court made interim non-publication orders preventing publication of the names of the parties and of two witnesses. Those orders were made by consent, recognising that COVID-19 vaccinations have been contentious in New Zealand and that the Court was not considering the plaintiff's substantive claims, which still need to be progressed.

[41] The evaluation may be different if permanent non-publication orders are sought in the Authority or Court, particularly in respect of the names of the parties. Should the Authority decline a permanent non-publication order over either or both parties and/or either or both witnesses, the Court's corresponding interim order would likewise cease to have effect 14 days thereafter. Otherwise, the orders of the Court continue, pending any further order of the Court.

J C Holden
Judge

Judgment signed at 11.15 am on 9 November 2022

¹² "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.